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December 17, 2002

Ex Parte

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th H Street, SW, Portals
Washington, DC 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98; *and Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147

Dear Ms. Dortch:

The attached letters from William Barr of Verizon were provided to Chairman Powell, Commissioner Abernathy, Commissioner Adelstein, Commissioner Copps and Commissioner Martin respectively today. Please place it on the record in the above proceeding. Please let me know if you have any questions.

Sincerely,

Attachments

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin
Commissioner Copps
J. Rogovin
L. Zaina
C. Libertelli
M. Brill
D. Gonzalez
J. Goldstein
W. Maher
J. Carlisle
M. Carey
R. Tanner
S. Bergmann
B. Olson
T. Navin

William P. Barr
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December 17, 2002

The Honorable Michael Powell
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Chairman Powell:

This is a follow up to my letter to you of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

WPBarr

William P. Barr

Attachment

cc: Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements … for the sole purpose of unbundling those elements for … other carriers." *See, e.g.*, *Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

Michael E. Glover (KAD)

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December 17, 2002

The Honorable Kathleen Abernathy
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Abernathy:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

WPBarr

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Adelstein
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements ... for the sole purpose of unbundling those elements for ... other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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December 17, 2002

The Honorable Jonathan Adelstein
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Adelstein:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

WPBarr

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Copps
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements … for the sole purpose of unbundling those elements for … other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

Michael E. Glover (KAD)

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December 17, 2002

The Honorable Michael Copps
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Copps:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

WPBarr

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Martin

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that “collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior” (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission’s analysis in the *Pricing Flexibility Order* and the D.C. Circuit’s subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, “because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities.” *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission’s impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission’s decision in the *Supplemental Order Clarification* and the Court’s decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an “unbundling obligation” for purposes of offering a service in a particular market *only* if “denial of the requested elements *would in fact impair the competitor’s ability to offer services*” in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements … for the sole purpose of unbundling those elements for … other carriers." *See, e.g., Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

Michael E. Glover

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December 17, 2002

The Honorable Kevin Martin
Commissioner
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Commissioner Martin:

This is a follow up to my letter to Chairman Powell of October 16, 2002 in which I proposed a framework for addressing the issues before the Commission in the pending review of its unbundled network element rules.

My purpose here is to provide you with a copy of the attached letter, which elaborates on certain of the points made in my October 16 correspondence discussing application of the Act's unbundling standard to the competitive special access market and to high-capacity facilities generally. Specifically, the attached letter elaborates on three crucial points:

First, as the Commission itself has recognized, special access today is a mature competitive market, and that fact is due in part to previous Commission policies that promoted the growth of facilities-based competition in this market segment. To avoid jeopardizing this competitive success story, it is critical that the Commission reconfirm existing restrictions on the use of unbundled network elements to provide traditional special access service.

Second, with respect to high capacity DS-1 facilities that are used for local traffic, the Commission itself has previously determined that, in areas where the Commission has granted pricing flexibility to incumbent carriers, competing carriers already have made "irreversible investments" in competing facilities. Under the standards in the Act and the D.C. Circuit's orders, therefore, unbundling of high-capacity facilities cannot be required in these areas. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

Third, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. Simply put, when competing carriers are already successfully competing and serving customers using special access, allowing access to the same facilities at UNE prices is an uneconomic arbitrage process that serves no competitive purpose under the Act, and in fact injures facilities-based competition. Consequently, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

Binding federal determinations that are consistent with these key principles are critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segments served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business.

Sincerely,

WPBarr

William P. Barr

Attachment

cc: Chairman Powell
Commissioner Abernathy
Commissioner Adelstein
Commissioner Copps

1300 I Street, NW
Suite 400 West
Washington, DC 20005

December 17, 2002

William F. Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Mr. Maher:

The purpose of this letter is to address in greater detail the application of the Act's unbundling standards to high-capacity facilities – loops and dedicated transport. In particular, this letter elaborates on three central points addressed in William Barr's letter to Chairman Powell of October 16, 2002. Because competition for the highest capacity services (DS-3 and above) is pervasive, and there is virtually no reliance on unbundled elements for those services today, this discussion focuses on unbundling requirements associated with dedicated DS-1 services.

- *First*, at a bare minimum, the Commission should reconfirm restrictions on use of high-capacity facilities to provide traditional special access service for long distance traffic, because the evidence is overwhelming that competitors have captured a significant percentage of this market segment without access to UNEs.

- *Second*, with respect to use of high capacity facilities for local traffic, the Commission itself already determined in its *Pricing Flexibility Order* that, in areas that qualify for either Phase I or Phase II pricing flexibility, "competitors have made irreversible investments in facilities" (14 FCC Rcd 14221, ¶ 77 (1999)); consequently, under the standards articulated by the D.C. Circuit, no unbundled access to high-capacity facilities can be ordered in these areas. A binding federal determination to this effect is critical to providing the certainty that promotes investment by competitors and incumbents alike. And promoting investment in the market segment served by dedicated high-capacity facilities is particularly important because it is these higher-end markets that drive innovation in the telecommunications business. In addition, outside the areas where pricing flexibility has been granted, the Commission should adopt concrete, objective standards that must be applied in determining whether unbundled access to high capacity facilities is required.

- *Third*, given the nature of the market segment at issue here, and the fact that competitors can and are using tariffed DS-1 special access services purchased from incumbents and others to compete successfully for local customers, the availability of these tariffed services is an additional factor that must be taken into account. In particular, the availability of tariffed special access service provides additional support for eliminating unbundling obligations in those areas where incumbents have qualified for Phase I or Phase II pricing flexibility and is an additional factor that must be taken into account in determining whether competing providers are impaired without access to the same facilities as unbundled network elements in other areas.

1. Competitors Are Not "Impaired" If Particular Markets Are Contestable in the Absence of Unbundled Network Access

As an initial matter, four of the key legal principles established by the D.C. Circuit's decisions in *United States Telecom Association v. FCC,* 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*") and *Competitive Telecommunications Association v. FCC*, 309 F.3d 8 (D.C. Cir. 2002) ("*CompTel*") are particularly pertinent to the Commission's analysis of these issues.

First, determination of circumstances where mandatory unbundling may be appropriate under section 251(d)(2)'s impairment standard must be "linked (in some degree) to natural monopoly" characteristics of an element. Unbundling may be appropriate only if "genuinely competitive provision *of an element's function* [would be] wasteful" because "the cost characteristics of an 'element' render it . . . unsuitable for competitive supply." *USTA*, 290 F.3d at 427. Under this standard, the Commission may require unbundling of a particular element only in circumstances where unbundled access to the element is needed to permit requesting carriers to compete in the particular market where the carrier seeks to offer service. If the market in question is subject to competitive entry – *i.e.*, if the market is contestable – in the absence of unbundled access to a particular element, competitors are not "impaired" within the meaning of the statute. That standard is unquestionably satisfied in cases where (1) a particular element has been "significantly deployed on a competitive basis" (*id.* at 422); or (2) if a functional alternative to the element is otherwise available either from the incumbent or "'outside the incumbent's network.'" (*id.* at 429 (quoting *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389 (1999) ("*AT&T*"))). Where markets are contestable without access to unbundled elements, the costs of unbundling outweigh any possible benefit. As the court noted, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *Id.* at 427.

Second, the Commission must "consider the markets in which a competitor 'seeks to offer' services and, *at an appropriate level of generality*, ground the unbundling obligation on the competitor's entry into those markets in which denial of the requested elements would in fact impair the competitor's ability to offer services." *CompTel*, 309 F.3d at 10 (quoting *Supplemental Order Clarification*, 15 FCC Rcd 9587, ¶ 15 (2000)) (emphasis added). One aspect of that inquiry must be defining an appropriate *geographic* market in which to assess impairment. As the Commission held in its *Pricing Flexibility Order*, the task is "to define . . .

geographic areas narrowly enough so that the competitive conditions within each area are reasonably similar, yet broadly enough to be administratively workable." *Pricing Flexibility Order*, ¶ 71. There, the Commission held that "MSAs best reflect the scope of competitive entry, and therefore are a logical basis for measuring the extent of competition." *Id.* at ¶ 72. In contrast, the Commission rejected a wire center by wire center analysis, both because it was unnecessary to reflect the scope of competitive entry and because it would be administratively unworkable. The D.C. Circuit affirmed this Commission's determination of the appropriate geographic market for use in assessing competitive entry, and expressly rejected the argument that it is necessary to carry out such an analysis wire center by wire center. *WorldCom, Inc. v. FCC*, 238 F.3d 449, 446-61 (D.C. Cir. 2001) ("*WorldCom*").

Third, the Commission must consider evidence of impairment on a service-specific basis. As the D.C. Circuit noted in upholding the Commission's existing limitations on the use of unbundled elements to provide special access services, "it is far from obvious to us that the FCC *has the power* without an impairment finding as to nonlocal services, to require that ILECs provide EELs for such services on an unbundled basis." *Comptel*, 309 F.3d at 13 (emphasis added); *see also USTA*, 290 F.3d at 426 (suggesting that the statute requires "a more nuanced concept of impairment" that considers "specific markets or market categories"). To use an example that is elaborated on below, in analyzing the need to unbundle high-capacity facilities, the Commission should continue to evaluate the special access market for long distance traffic – which has special characteristics for both functional and historical reasons – as a separate market segment.

Fourth, because a finding of impairment is a prerequisite to imposing an unbundling requirement, and that finding obviously must be based on substantial record evidence, the burden is on the proponents of unbundling to demonstrate that the impairment standard has been satisfied for a particular element in a relevant segment of the market. This point is especially important in cases such as this where there is no question that the facilities at issue already have been significantly deployed on a competitive basis. Under these circumstances, absent concrete evidence to the contrary, the presumption has to be that the facilities are capable of being competitively supplied both where they have been deployed and where they as yet have not. Indeed, as the D.C. Circuit recognized, deployment of competitive facilities in certain markets indicates that all markets with comparable characteristics are likewise contestable, even if facilities have not actually been deployed. *See USTA*, 290 F.3d at 422. Or as Chairman Powell put it at the time of the *UNE Remand Order*: "evidence of CLEC [facilities] deployment strongly suggests that CLECs are not significantly impaired without access . . . both in areas in which CLECs have deployed [facilities] *and areas in which they have not done so*." 15 FCC Rcd 3696, 3927 (1999) (emphasis added).

2. The Commission Should Retain Its Restriction on Special Access Bypass

At a bare minimum, the Commission should confirm that high-capacity facilities need not be made available – either alone or in combinations – for the provision of traditional special access service, *i.e.*, in those situations where the requesting carrier seeks to use the requested

facilities to establish a connection between the customer's premises and a carrier's point of presence without providing "a significant amount of local exchange service." *See Supplemental Order Clarification*, ¶ 8.

As noted above, the D.C. Circuit has already held that the Commission was permitted – indeed, required – by the terms of the Act to undertake a service-specific analysis that distinguishes between the local and long-distance-access segments of the market. *CompTel*, 309 F.3d at 13. And when it comes to special access service for long distance traffic, the Commission has correctly recognized that the extensive existing competition proves that telecommunications carriers are not impaired in their ability to provide special access service without access to unbundled elements. To the contrary, the FCC has properly found that the market for special access has become highly competitive in the absence of UNE access. "Competitive access, which originated in the mid-1980s, is a mature source of [facilities-based] competition in telecommunications markets." *Supplemental Order Clarification*, ¶ 18. This is true regardless of whether the special access traffic at issue is voice or data, as would be expected because the facilities used for both types of traffic are the same.

The FCC's prior decision to restrict the use of UNEs to provide special access service was sound. In the *Supplemental Order Clarification*, the Commission properly noted that "the exchange access market occupies a different legal category from the market for telephone exchange services." *Supplemental Order Clarification*, ¶ 14. It was therefore impossible for the Commission to grant competitors access to network elements "solely or primarily for use in the exchange access market" without first finding that competitors are impaired in their ability to provide special access services without access to UNEs. *Id.* at ¶ 15. Based on the record before it, the Commission found no evidence that competitors in the special access market are impaired without access to unbundled loops and transport: "we generally do not impose such obligations first and conduct our 'impair' inquiry afterwards." *Id.* at ¶ 16. Moreover, to grant access could cause "substantial market dislocations" by "undercut[ting] the market position of many facilities-based competitive access providers." *Id.* at ¶¶ 7, 18.

The current record strongly supports those conclusions. No party has introduced evidence, let alone carried their burden of demonstrating, that competitors are impaired in the provision of special access service. To the contrary, the evidence is that competition has continued to thrive in the rapidly expanding special access market *without* access to UNEs. Competitors account for a third or more of *total* special access revenues *nationwide*, and their share of the market has been growing rapidly. *See* UNE Fact Report 2002 at III-1, IV-6, IV-7. Competitors now have extensive local networks in place in most of the markets where special access demand is concentrated. A number of wholesale fiber suppliers also serve most major markets. And even in the areas where competitive facilities are not yet available, competing providers have been able to compete successfully by reselling special access service purchased from incumbents. Competitors now provide more than 150 million voice-grade equivalent special access and private lines using either their own facilities, the facilities of other competitive suppliers, or by reselling ILEC special access service. Such widespread and pervasive competition establishes beyond serious dispute that the traditional special access market is

contestable – that is, that competing providers can and do compete effectively in the special access market without UNEs. Consequently, the record here compels the conclusion that competing providers are not impaired in their "ability to provide long distance or exchange access service" without access to unbundled elements, including high capacity loops and transport. *Cf. CompTel*, 309 F.3d at 13.

Moreover, the Commission's concerns about market dislocations and undermining the market position of facilities-based competitors likewise require that the Commission affirm its determination that competitors are not entitled to unbundled network elements to provide special access service. As the D.C. Circuit noted in its decision upholding the Commission's existing restrictions on the use of UNEs to provide special access, Congress "preferred 'facilities-based competition' over 'parasitic free-riding.'" *CompTel*, 309 F.3d at 20. It would be contrary to the goals of the Act and this Commission's policies to displace existing facilities-based competition with "completely synthetic competition" using elements of the incumbents' networks provided at TELRIC rates. *See USTA*, 290 F.3d at 424. At a minimum, therefore, it is critical to maintain restrictions on the use of unbundled elements to provide special access in order to avoid disrupting this well functioning, competitive market.

Moreover, the current restrictions were proposed by a cross-industry group that included major CLECs, and were expressly upheld by the D.C. Circuit in *CompTel*, 309 F.3d at 22. While some CLECs unquestionably have tried to game the current tests for determining whether the substantial local traffic requirement is satisfied, overall the tests have proven to be workable. In fact, while some parties here rehash their previous claims that the tests are not administratively feasible, the D.C. Circuit squarely rejected those claims, holding that "it is plain that supplying the information is feasible, as the FCC has produced evidence that some carriers are taking advantage of the safe harbors." *Id*. If anything, the current tests are too lax and allow circuits to be converted to sub-competitive TELRIC pricing even when they are used predominantly for non-local traffic. Given all of this, there is no basis for relaxing these existing restrictions further, and doing so would serve only to undermine the mature facilities-based competition that already exists.

This is equally true of the existing companion rule prohibiting "commingling" of unbundled elements with special access services. As the Commission explained to the D.C. Circuit, this prohibition is "the only way to prevent carriers from using these units 'solely or primarily to bypass special access services,'" because "allowing commingling would allow carriers to avoid the requirement that each customer be provided a significant amount of local exchange service." *Id*. at 22-23. The court agreed, and recognized that the prohibition is necessary to prevent the "gaming" that otherwise would occur. For example, as the court itself pointed out, the absence of a commingling restriction would "allow the entire base of the loop or 'channel termination' portion of special access circuits to be converted into unbundled loops." *Id*. at 24. And that, of course, would undermine the existing facilities-based competition that the Commission sought to preserve and promote.

3. Where ILECs Have Qualified for Pricing Flexibility, They Should Not Be Required To Provide Unbundled Access to High Capacity Facilities

Even if CLECs plan to use high-capacity facilities to provide a substantial amount of local exchange service – as opposed to solely or primarily special access service – they should not have access to unbundled high capacity loops and transport where the market for local services provided using these facilities is contestable without access to high capacity facilities at UNE rates. In those situations where competitive facilities already exist, provision of those facilities is not merely contestable, but already contested. Indeed, to require access in that circumstance – *i.e.*, where facilities have been "significantly deployed on a competitive basis" (*USTA*, 290 F.3d at 422) – would violate the Supreme Court's admonition that the Commission cannot "blind itself to the availability of elements outside the incumbent's network" (*AT&T*, 525 U.S. at 389).

It is critical that the Commission itself establish binding restrictions on incumbents' unbundling obligations based on objective market conditions. Clear, readily applied national rules will provide stability and certainty, which will in turn promote investment and innovation by competitors and incumbents alike. And the Commission unquestionably has both the legal authority and the obligation to establish binding national rules: the Act gives "the Commission" – not the states – the power to "determin[e] what network elements should be made available" on an unbundled basis. 47 U.S.C. § 251(d).

Moreover, the Commission has already created an appropriate framework – and in a series of subsequent orders already has applied that framework itself – for initially identifying certain geographic markets where unbundling of high-capacity facilities *cannot* be required in its *Pricing Flexibility Order*. In that order, the Commission granted incumbents pricing flexibility for special access services, conditioned on a showing that "market conditions in a particular area warrant the relief at issue." *Pricing Flexibility Order*, ¶ 68. The requisite showing focuses on precisely the question that the courts have made clear must be considered before any unbundled access may be required: investment in competitive facilities. Indeed, the Commission granted relief specifically because it determined that certain geographic markets were *contestable* where a significant portion of those geographic areas already were being *contested* – that is, competing providers already had made sunk investments in competing facilities.

Thus, the Commission ruled that incumbents are to be granted "Phase I" regulatory relief – that is, the ability to offer contract tariffs and volume and term discounts – once they can show that "competitors have made irreversible investments in the facilities needed to provide the services at issue." *Id.* at ¶ 69. As the Commission found, such investment "is an important indicator of . . . irreversible entry" because, even if a particular competitor does not succeed, "that equipment remains available and capable of providing service in competition with the incumbent." *Id.* at ¶ 80. And to obtain "Phase II" relief, where the incumbent's own rates are effectively deregulated, the incumbent must make an even more extensive showing – that is, it must show that the market not only is contestable, but that a sufficient portion of the geographic

market at issue is actually being contested such that the market is workably competitive and market forces alone will constrain the incumbent's rates. *Id.* at ¶ 69.

The Commission has established separate competitive triggers to allow pricing flexibility for (1) dedicated transport and (2) service over high-capacity loops, known as "channel terminations." *See id.* at ¶ 70. Accordingly, a determination that "competitors have made irreversible investments in the facilities needed" to provide dedicated transport establishes that competitors are not impaired without unbundled access to an incumbent's high-capacity dedicated transport facilities. If an incumbent has been granted Phase I relief with respect to dedicated transport in a particular MSA, therefore, the Commission should not require provision of unbundled access to dedicated transport. The same logic applies to high-capacity loops: in any MSA where the Commission has granted Phase I relief for channel terminations under the separate standard that applies to those facilities, the Commission should not require provision of unbundled access to high capacity loops.

The Commission should definitively eliminate unbundling obligations wherever the incumbent has qualified for either Phase I or Phase II relief. Phase I triggers were specifically designed to identify markets where there is "facilities-based competition with significant sunk investment" and therefore an alternative to an incumbent's facilities for the provision of service. *See id.* at ¶ 80. By contrast, Phase II relief – which essentially deregulates incumbents' rates – is granted in those markets where competitors have *already* "established a significant market presence," sufficient to constrain ILEC end-user pricing. *Id.* at ¶ 141; *see also id.* at ¶ 77 ("competitors that are sufficiently entrenched to survive attempts by incumbents to exclude them from the market [by lowering prices to end-users] may not yet have a sufficient market presence to constrain prices throughout the MSA"). Because the impairment analysis must focus on "CLECs' *ability* to provide . . . service," (*CompTel*, 309 F.3d at 13 (emphasis added)), the existence of mature competition – while more than *sufficient* to establish non-impairment – is not *necessary* to demonstrate non-impairment.

The fact that an incumbent has been granted Phase I or Phase II pricing flexibility relief in a particular area provides conclusive evidence that the corresponding network elements – *i.e.*, high-capacity transport or loops – need not be made available on an unbundled basis in that area. At the same time, the fact that an ILEC has not yet received such relief in a particular geographic area – and such relief currently covers only 37 percent of Verizon's wire centers (and a smaller percentage of wire centers nationwide) – does not relieve the Commission of the need to conduct an impairment inquiry with respect to these other areas. To the contrary, competing carriers can and have deployed competing facilities outside the areas where incumbents have been granted pricing flexibility as well. And if the segment of the local market served with high-capacity facilities is contestable in the absence of unbundled access, granting such access would be contrary to the "goals of the Act." *AT&T*, 525 U.S. at 388. Accordingly, the Commission should establish additional, objective triggers for the removal of high-capacity facilities from the UNE list outside the areas where pricing flexibility has been granted.

We continue to believe that the extensive evidence demonstrating that competing carriers have widely deployed their own high-capacity facilities where there is demand for high-capacity services shows that they are not impaired anywhere without the ability to purchase these facilities from incumbents at artificially low TELRIC rates. At an absolute minimum, however, just as the Commission determined that "collocation can reasonably serve as a measure of competition in a given market and predictor of competitive constraints upon future LEC behavior" (*WorldCom*, 238 F.3d at 459), the Commission should likewise rule that, outside those areas where pricing flexibility has been granted, high-capacity facilities do not have to be available as UNEs in any wire center where there are two or more fiber-based collocated competitors – regardless of the prevalence of collocation in the remainder of the MSA. Such a rule is fully supported by the Commission's analysis in the *Pricing Flexibility Order* and the D.C. Circuit's subsequent affirmance: collocation is a reliable indicator of sunk investment of a type that proves that the markets served in that particular wire center are contestable. Indeed, as the Commission and the court each recognized, collocation tends to *underestimate* the degree of facilities-based investment, "because it fails to account for the presence of competitors that do not use collocation and have wholly bypassed incumbent LEC facilities." *Pricing Flexibility Order*, ¶ 95.

Finally, as long as competitors have access to ILEC high-capacity facilities on an unbundled basis, they have little incentive to deploy competing facilities. For that reason, the Commission should require that *if* high-capacity facilities are made available, any such unbundling obligation should have a firm sunset date.

4. The Commission Must Consider the Availability of ILEC Tariffed Special Access Services

The availability of tariffed special access services as an alternative means of serving customers is an additional factor that must be taken into account as part of the Commission's impairment analysis. Specifically, the availability of special access service is an additional factor that supports removing the obligation to unbundle high capacity facilities in any areas where the incumbent has qualified for pricing flexibility relief, and is also a factor that must be taken into account in establishing objective standards to determine whether high capacity facilities must be unbundled outside these areas.

Consideration of the availability of tariffed special access services as an alternative is compelled by the language and logic of the Commission's decision in the *Supplemental Order Clarification* and the Court's decisions in *USTA* and *CompTel*. As the Commission has held, it is appropriate to impose an "unbundling obligation" for purposes of offering a service in a particular market *only* if "denial of the requested elements *would in fact impair the competitor's ability to offer services*" in *that market*. *Supplemental Order Clarification*, ¶ 15 (emphasis added); *see CompTel*, 309 F.3d at 10. If markets are contestable without access to unbundled network elements, that is the end of the matter. Or to put it another way, if competing providers are able to enter the market and compete successfully using a combination of tariffed special access services purchased from the incumbent and their own facilities, they self-evidently are not

impaired without access to unbundled elements. Indeed, that is precisely the way that competition developed in the long-distance market: competing carriers relied initially on services purchased from AT&T under volume and term discount arrangements until they completed the build out of their own facilities. Likewise, special access services are available under tariffs that include volume and term discounts, and carriers have the same ability as they do in the long distance market to use these arrangements to supplement their own facilities as they complete the build out of their networks.

Accordingly, competitors' efforts to gain access to high-capacity facilities as UNEs is *exclusively* about price, since the same *function* is served by purchasing high capacity facilities at special access rates. Providing access to facilities at TELRIC rates – rather than the competitive rates available under tariff – simply encourages anti-competitive arbitrage, an uneconomic wealth transfer from incumbents to competitors that discourages productivity and innovation and penalizes investment.

In the case of those local customers served over high-capacity facilities, it is clearly the case that other providers can and do compete successfully using existing special access services purchased from incumbents and others to fill gaps in their networks. Indeed, there is significant marketplace evidence that proves that competitors that obtain high-capacity circuits from incumbents (rather than provisioning them independently or purchasing from a third-party supplier) rely on special access services far more often than on UNEs. In Verizon's region, for example, competing carriers as a whole had obtained almost twice as many DS-1 circuits as special access than as UNEs. In addition, many competing carriers that obtain high capacity circuits from incumbents do so entirely by purchasing special access service rather than UNEs. In Verizon's region, for example, there are several competing carriers that purchase all their DS-1 circuits exclusively as special access, and many others that rely on special access primarily (though not exclusively) to satisfy their demand for DS-1 circuits. Based on a sample of nine of the largest purchasers of special access, three purchase all of their DS-1 circuits as special access, and five additional competing carriers purchase 80 percent or more of all of their DS-1 circuits as special access.

Moreover, there's no real question that competing carriers are competing successfully using tariffed special access services purchased from incumbents and others to provide local services as well as to provide their own special access services for long distance traffic. This makes sense given the nature of special access service and the markets served. Tariffed special access services are provided over dedicated point-to-point facilities deployed specifically to meet the needs of carriers and business customers, not residential users. For example, carriers can and do use *existing* special access services to provide the direct link between customer premises and their local networks (as opposed to a long distance carrier's POP), including their equipment collocated in incumbent's central offices – even in circumstances where the ILEC provides no service of any kind to the end-user customer directly. This allows carriers to integrate the special access circuits into their own local networks, and use them to carry customers' local as well as long distance traffic. Using such services, providers have successfully competed for business customers of all shapes and sizes, from the most concentrated and most lucrative telecommunications consumers to small business customers. For example, the customers that are

being served by competing carriers in this fashion range from donut shops and car dealerships to law firms, doctor's offices, brokerage branch offices, hospitals, and educational institutions.

There can thus be no doubt that there is *already* fierce competition to serve those customers, both in the market for the customer-to-carrier connections themselves and in the vertical telecommunications markets – including long-distance and local voice and data services – in which high-capacity facilities provide an input. Indeed, competing carriers have won roughly 150 million voice grade equivalent lines using a combination of their own facilities and special access circuits purchased from incumbents and others. And they are competing successfully in providing various services that use special access as an input, such as enterprise long distance services, high-speed data services such as ATM and Frame Relay, and local services provided to large business customers. Indeed, a group of large business customers just informed the WorldCom bankruptcy court that, "Sprint, AT&T and WorldCom account for over 90% of enterprise telecommunications usage and are widely viewed as the only interexchange carriers capable of providing the full suite of network services required by major corporations." The evidence of such robust competition in vertical or adjacent markets establishes that access to high-capacity facilities is no barrier to competition. *Cf. Advanced Health-Care v. Radford Comm. Hosp.*, 910 F.2d 139, 150 (1990) ("[T]he central concern in an essential facilities claim is whether market power in one market is being used to create or further a monopoly in another market."); *USTA*, 290 F.3d at 427 n.4. Indeed, as this Commission has held, once such competition exists, it can expand into additional market segments: "large customers may create the inducement for potential competitors to invest in sunk facilities which, once sunk, can be used to serve adjacent smaller customers." *Pricing Flexibility Order*, ¶ 79.

Taking account of the availability of special access services as an alternative to unbundling high-capacity facilities is especially appropriate in light of the unique characteristics of special access. The Commission has already concluded that special access services are competitive, and that – in many markets – competition already constrains special access retail prices, and competitors have used special access in combination with their own facilities to enter local markets. Taking into account the availability of competitive special access service in this context thus does not compel the conclusion, for example, that the possibility of competing by reselling incumbents' retail services would eliminate the need to unbundle local loops for provision of local voice service. But under the specific circumstances here, where tariffed special access services can and are being used to compete successfully, it would be reversible error for the Commission to fail to take that alternative into account in conducting its impairment analysis.

Finally, Verizon's opponents claim that the only reason they buy Verizon's special access services is because they have been unable to obtain the equivalent services as UNEs. As an initial matter, as we have explained at length elsewhere, Verizon *does* provide unbundled high-capacity facilities wherever such facilities exist. The instances in which it does not do so are those where the requested facilities do *not* exist, and, therefore, they could not be provided without investing in and deploying new facilities or equipment or without undertaking significant construction work. That is entirely consistent with the Act, which the Commission has

recognized "does not require [Verizon] to construct network elements … for the sole purpose of unbundling those elements for … other carriers." *See, e.g.*, *Virginia Arbitration Non-Cost Order*, CC 00-218, DA 02-1731, ¶ 468 (rel. July 17, 2002). Moreover, even in those instances, the simple fact is that Verizon will build facilities for use by competing carriers to the same extent as it will for its own retail customers, and will make the newly constructed facilities available at competitive special access rates (which, in contrast to sub-competitive TELRIC rates, provide at least an opportunity to recover the costs of constructing the facilities).

More fundamentally, however, the opponents' claim misses the point entirely. Regardless of the *reason* they use special access services purchased from Verizon to compete, the fact of the matter is that they have demonstrated they are able to enter and compete successfully by using those services. While they no doubt would prefer to pay the artificially low TELRIC rates, that proves nothing. If competing carriers are able to enter and compete using a combination of special access and their own facilities (as these carriers have), then they self-evidently are not impaired without access to the same facilities at UNE rates. And providing access to these facilities at artificially low rates under these circumstances would merely undermine the continued growth of facilities-based competition and flout the directives of the D.C. Circuit.

Sincerely,

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